11-15-79

BEFORE THE
COPYRIGHT ROYALTY TRIBUNAL
WASHINGTON, D. C.

Cable Royalty Distribution Proceeding	)

MEMORANDUM OF
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

I. Introduction

The National Collegiate Athletic Association -- an association of 725 four-year colleges and universities, 71 allied collegiate conferences and 66 associated and affiliated institutions and organizations -- submits this Memorandum in response to the Copyright Royalty Tribunal's October 13, 1979 Notice[1/] requesting cable television royalty distribution claimants to tender legal briefs or memoranda regarding certain threshhold issues in the present distribution proceedings.

This Memorandum addresses the following two issues listed by the Tribunal's Notice:

(1) "objections raised to the standing of certain or all sports claimants"; and

(2) "the issue of the broadcast day as a copyright compilation."

However, in view of the open-ended nature of the Tribunal's solicitation of views "concerning any other question of copyright ownership as it affects a claim or right to any of the cable tele-

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1/ 44 Fed. Reg. 59,930 (1979).

vision royalties", the NCAA reserves the right to address as appropriate in subsequent stages of these proceedings other threshhold issues which may be raised touching on its right to royalty distributions.

II. Summary

The question of standing raised by the Notice is a question of copyright ownership, an issue that must be resolved on the facts.[2/] In the case of each of the sports event telecasts covered by the claims filed by the NCAA: (a) the NCAA, college or conference was named in the broadcast itself as the owner of the rights to the broadcast; and (b) the broadcast was produced by the NCAA or its member, or was a joint work of an institution or conference and the broadcast producer. Thus, the NCAA -- or the member college or collegiate conference joined in the NCAA's claim -- is unquestionably the owner of copyright in the broadcasts covered, and thus a proper claimant in these proceedings.

The issue of the broadcast day as a copyright compilation is, upon examination, an irrelevancy. Were it necessary to address

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2/ Facts concerning the particular college sports event broadcasts concerned are set forth in Section IV. To the extent possible in time for this filing, that information is supported by affidavits, copies of which are attached hereto and incorporated by reference herein. Otherwise, the description of the facts is based upon conversations between Counsel to the NCAA and officials of relevant higher education institutions and organizations. To the best of the NCAA's information and belief, the factual statements contained herein are true, correct and complete.

the question, it would be clear that a broadcast station's "broadcast day" does not constitute a single entity or work, and that it thus is not a compilation or collective work under the Copyright Law. However, even if it is assumed that something called a "broadcast day" (or broadcast week, month or year) can be said to be a compilation or collective work within the meaning of the copyright law, that collective work has no value as a collective work to viewers. Whatever copyright broadcasters may have in any such alleged "collective work" is, therefore, of no significance in these proceedings.

III. Statutory Provisions

The basic statutory standard applicable in these distribution proceedings is set forth in Section 111(d)(4) of the Copyright Revision Act of 1976 ("Act"), 17 U.S.C. § 111(d)(4), which provides that cable television royalty fees deposited with the Register of Copyrights are to be distributed to certain classes of copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant time periods. In the context of the NCAA's claims, the following provisions of the Act (and related decisional law) with respect to copyright ownership are pertinent:

A. Section 201(a) provides that initial copyright vests in the author or authors of a work, and that the authors of a joint work are to be considered coowners of copyright in it. 17 U.S.C. § 201(a). The term "author" is nowhere defined by the

statute. The Act's legislative history indicates that the omission was deliberate, with the purpose of leaving intact existing decisional law on the subject.[3/] In general, the term denotes the person or persons who create the original work which is subject to copyright (see, e.g., April Productions v. G. Schirmer, Inc., 308 N.Y. 366, 126 N.E.2d 283 (N.Y. App. 1955).

B. The Act recognizes that not all works are the result of the labor of single individuals and provides, as did prior law, for co-ownership of "joint works". Such works are defined as those prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. 17 U.S.C. § 101.

C. Section 201(b) of the Act recognizes the principle established by prior law that in the case of a work made for hire, the employer or other person for whom the work was prepared is to be considered its author unless the parties have agreed to the contrary in writing. 17 U.S.C. § 201(b).

D. The Act also provides that the rights of a copyright owner, or a part of such rights, may be voluntarily transferred to another. 17 U.S.C. §§ 201(d), 204.

These principles are applied below to the facts surrounding the telecasts covered by the NCAA's claims.

3/ See House Comm. on the Judiciary, Copyright Law Revision, H.R. Rpt. No.94-1476, 94th Cong., 2d Sess. 120-121 (1976).

IV. Standing of NCAA and NCAA Member Claimants

The sports event broadcasts covered by the NCAA's claims[4/] fall generally into three categories, each of which is discussed individually below.

A. NCAA- or NCAA Member-Produced Telecasts.

Specifically mentioned in the initial claim for cable television royalties submitted by the NCAA to the Tribunal in July, 1978 are two telecasts produced by the NCAA. Those telecasts involved basketball games (Missouri v. Utah and Creighton v. DePaul) which were a part of the NCAA-sponsored National Collegiate Basketball Championship held in early 1978. As set forth in further detail in the attached affidavit of C. Dennis Cryder, Director of NCAA Productions, those telecasts were produced by the NCAA. The necessary production equipment was secured by the NCAA and all the production personnel -- including cameramen, producers,

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4/ The NCAA has identified certain telecasts as to which it is entitled to receive royalty distributions on its own behalf or on behalf of others with whom it has filed jointly. This Memorandum discusses the questions raised as to the NCAA's (or jointly claiming institution's) standing as a royalty claimant in the specific factual context of presently known cases. Neither the Memorandum nor the claims previously filed by the NCAA, nor the supplemental filing previously submitted by it are intended to be an exhaustive listing of all telecasts to which the NCAA or the institutions are entitled to copyright royalty distributions. However, we believe that the examples specifically discussed in this Memorandum fairly represent the various factual contexts of the numerous broadcasts which give rise to the NCAA's claim, and thus they form an adequate basis for the establishment of the NCAA's right to royalty distributions.

directors, play-by-play announcers and commentators -- were either directly employed by or under exclusive contract to the NCAA for the purpose of those telecasts. All of the steps, including fixation, required by the Copyright Revision Act to obtain statutory copyright in these broadcasts were taken by the NCAA.

Seven television broadcasters received limited licenses authorizing them to carry those works. The licenses permitted the broadcasters to carry the live signal of the games, and to utilize no more than two minutes of each game broadcast in subsequent news coverage. No further rights were granted by the NCAA to the broadcasters with respect to either of these programs, and thus all of the NCAA's remaining rights as copyright holder were reserved and protected. As a condition of receiving the limited licenses, the broadcasters were required to carry the following announcement over-the-air during each of the broadcasts:

> This telecast is presented by authority of the National Collegiate Athletic Association and NCAA Productions and any use of this program without written consent is prohibited. The announcers on this program have been approved and contracted for by the NCAA.

These sports programs are clearly the subject matter of copyright, and the NCAA is clearly the owner of copyright in them. The Act provides that copyright protection subsists "in original works of authorship fixed in any tangible medium of expression", 17 U.S.C. § 102(a), and its legislative history confirms that a sports event broadcast recorded prior to or at the

time of transmission is an original work of authorship with the meaning of that provision:

> When a football game is being covered by four television cameras, with a director guiding the activities of the four camermen [sic] and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes "authorship." The further question to be considered is whether there has been a fixation. If the images and sounds to be broadcast are first recorded (on a video tape, film, etc.) and then transmitted, the recorded work would be considered a "motion picture" subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If the program content is transmitted live to the public while being recorded at the same time, the case would be treated the same 5/

Here, as the producer of the telecasts, the NCAA was responsible for those activities which the House Committee characterized as authorship, as well as the performer of the many other activities -- including presentation of the event itself -- which combined to create these sports programs.

Moreover, there can be no question that the NCAA is the sole owner of copyright with respect to each of these works. The theoretical question of the relative degree of authorship exercised by the sponsor of an athletic event and the organization which prepares the actual telecast of it is of no practical relevance in these cases, since it would at most determine the

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5/ House Comm. on the Judiciary, Copyright Law Revision, supra note 3, at 52.

extent to which these telecasts could be said to be works directly authored by the NCAA as opposed to works made for hire for the NCAA. In either case, under the most fundamental copyright law principles, copyright to the broadcasts resides in the NCAA.6/

The broadcasters played no role in the preparation or creation of the program materials which are the subject of the NCAA claim. At most, the stations simply took materials that were furnished to them and retransmitted them verbatim. While the degree of creativity required to give rise to copyright under the Copyright Law is very limited, it is clear that the mere repetition, without change, of materials prepared by another does not constitute authorship.

Finally, each of the broadcast stations agreed to transmit, and by implication to be subject to, the notice quoted above. That notice clearly indicated that the telecast was presented by authority of the NCAA and NCAA Productions and that

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6/ The limited licenses granted to various broadcasters to carry the work which the NCAA produced do not in any way affect the NCAA's claim to copyright royalties in this proceeding. Nothing was contained in the licensing document which transferred any portion of the bundle of rights which constitute the NCAA's copyright in these works, other than the limited right of live carriage and use for news reporting discussed above. The statute requires that transfers of copyright ownership be set forth in written instruments signed by the parties (17 U.S.C. § 204(a)) and the absence of any such express transfer in any of the provisions of the licensing documents concerning the telecasts of the these games establishes that no copyright ownership whatsoever passed to the broadcast stations.

any use of the program without the written consent of those organizations is prohibited. That statement is inconsistent with any claim to copyright ownership in the broadcast by the broadcast stations. If the broadcasters were full copyright owners with respect to these broadcasts, there would be no requirement for obtaining NCAA's consent for further use of the program. Moreover, as copyright owner, no broadcaster would have been restricted to the limited rights of live carriage of the game and a small amount of retransmission for subsequent news coverage specified in the arrangements with the NCAA. The broadcast announcements and the broadcasters' acceptance of restrictions on their use of the telecasts contradict any claim on the part of the television stations to any substantive copyright interest in these broadcasts sufficient to support a claim for royalty distribution.

In view of the above, the NCAA is without question the sole owner of copyright in the March 12, 1978 telecasts of the Creighton v. DePaul and Missouri v. Utah games of the National Collegiate Basketball Championship series.7/

7/ Indeed, it appears that broadcasts of this type are not even within the scope of the National Association of Broadcasters' expansive claim, which postulated only that "stations . . . may be considered the copyright owners of their broadcasts of sports events, provided the broadcast coverage was produced by the station itself." National Association of Broadcasters, NAB Suggested Broadcaster's Justification 17 (July, 1979) [Emphasis supplied.]

B. Sports Telecasts Made With Independent Producers

During the first three months of 1978, some 36 basketball games played by institutions who are members of the Atlantic Coast Conference were telecast on a non-network basis and subject to extensive cable retransmissions. Each of the games was broadcast pursuant to arrangements between the Atlantic Coast Conference and the Castleton D. Chesley Company. Under those arrangements, the ACC-sponsored the games in question and the Chesley organization performed all necessary production work. The telecasts were licensed to one or more of four television stations, which broadcast them live. Each broadcast contained a copyright notice in the prescribed statutory form identifying the Atlantic Coast Conference and Castleton D. Chesley as copyright owners, and each was video taped at the time of presentation. The NCAA's claim in this proceeding is as assignee of the ACC and the Chesley organization.

The ACC telecasts present a situation which varies only slightly from the case of NCAA-produced telecasts discussed above. The question of whether and to what extent authorship -- and by extension copyright ownership interests -- vested respectively in the event arranger and the telecast producer (that is, the ACC and the Chesley organization) is irrelevant, since the NCAA claims as the holder of the former rights of both of those organizations. Similarly, it is again clear that the highly limited licenses granted to the broadcast stations did not confer copyright ownership upon them. Once again, the

licensing documents do not purport to transfer any rights to the individual broadcasters beyond the limited rights of carriage discussed above. Again, the role of the broadcasters in distributing the telecasts was an entirely passive one not involving the preparation or creation of a work subject to copyright protection. Finally, the copyright notices displayed with respect to each of these broadcasts leave no question that in each case the carrying broadcasters were aware that copyright resided in the ACC and the Chesley organization and acknowledged that fact. In the circumstances, the NCAA's copyright in these broadcasts and right to claim whatever cable royalties may accrue by virtue of such copyright cannot reasonably be questioned.

C. Sports Telecasts Made By Colleges and Individual Broadcasters

The final group of representative telecasts included in the NCAA's claims are three broadcasts of football and basketball games involving Boston College and the University of Kentucky. In each of these cases the college concerned authorized individual broadcasters to send television crews to provide television broadcasts of the game either on a live or delayed basis. In the case of the Boston College telecasts, a statutory notice of copyright in favor of the Boston College Athletic Association was displayed as a part of the broadcast. In the case of the University of Kentucky telecast, the following notice was read over the air by the announcer:

> Telecast of this University of Kentucky football game is the sole property of WKYT-TV and the University of Kentucky and any reproduction, transmission, or distribution of the description, pictures, or accounts of this game without the express written permission of WKYT-TV and the University of Kentucky is prohibited.[8/]

The distinction between this group of games and the proceeding ones is that the production crews were provided by the broadcast stations. Notwithstanding that distinction, under applicable copyright law principles the sponsoring colleges are at the least co-authors, and thus copyright owners, of these works. Whether or not the college's right is exclusive of any right on the part of the broadcast station concerned depends upon the facts in each case.

It is important to recognize that colleges play active roles in the sports telecasts that they authorize. Their central role, of course, is their arrangement of and participation in the athletic event which forms the basis of and reason for the telecast. This, however, is only the beginning of an institution's role in the making of a particular telecast. Prior to the athletic event, it is not uncommon for the sponsoring institution to meet with the broadcaster to plan for camera locations, power sources, and press passes. In addition, that institution will typically provide the broadcaster with player information such

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8/ See attached affidavit of Lawrence Ivy.

as rosters, school statistics, and player background and injury data. Additionally, colleges frequently provide broadcasters with spotters to assist in identifying the individual athletes involved in particular plays. Interviews, college statistics, campus tours and history, are also often provided by sponsoring institutions as the basis of a more successful and colorful public presentation.

This cooperative effort by the sponsoring organizations and the broadcaster continues during the event being broadcast. Starting times are often established and adjusted in order to accommodate the needs of television marketing. In many cases commercial time-outs are inserted in the game in order to accommodate the need for advertisements and station breaks. Quite often sponsoring colleges and universities present elaborate half-time shows geared, in part, to the interests of the television audience. Finally, the institutions provide materials, such as descriptions of the participating institutions and notices of the kind broadcast during the Kentucky game, that are incorporated in the broadcast.

In these circumstances, it is clear that Boston College and the University of Kentucky were at least co-authors of the telecast of the athletic events in which they participated and the broadcasting of which they authorized. As noted above, the recently revised copyright statute expressly recognizes the possibility of multiple authors of particular works, and defines such a joint work as:

> A work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. 17 U.S.C. § 101.

The legislative history of the Act stresses that the "touchstone" is the creators' intention that their effort "be absorbed or combined into an integrated unit . . . ."[9/] This is precisely the case with respect to each broadcast in this group. The sponsoring institution makes the major contribution to the final produced work by providing the underlying athletic event and by working hand-in-hand with the broadcaster to make a successful telecast possible. These telecasts thus represent a classic case of joint authorship.

It is the intention of the parties, and their actions in working together to create a single unified product, which gives rise to a joint work. Thus, in Edward B. Marks Music Corp. v. Jerry Vogel Music Corp., 140 F.2d 266 (2d Cir. 1944), the court stated the general rule that joint authorship is found if each author at the time of his contribution intends that it constitute a part of a total work to which another shall make (or already has made) a contribution. In Marks, the separate authorship of music and lyrics for a song was held to result in a joint work. The court found that the lyricist wrote his words with the intention that they be put to music, and that the composer wrote music

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9/ House Comm. on the Judiciary, Copyright Law Revision, supra note 3, at 120.

with the knowledge that he was composing for a particular set of lyrics. The same concept has been applied to other works, including books, plays, and motion pictures.[10/]

The contributions of co-authors to a joint work need not be precisely equal,[11/] and indeed the NCAA believes that Boston College and the University of Kentucky in fact made the preponderant contribution to each of these sports event telecasts. Certainly there can be no question that the contribution of the colleges was sufficiently substantial to accord them the status of co-authors under the copyright law.

Finally, the notices broadcast over-the-air in the course of the Boston College and University of Kentucky telecasts confirm the institutions' copyright ownership. As noted above, the University of Kentucky broadcast included the express statement that the broadcast was the property of the University of Kentucky and the television broadcaster, and that the consent of both parties was necessary for any further transmission of that broadcast. In the context of an audiovisual work of the kind concerned, a reference to property clearly contemplates copyright, and the notice documents the parties intent to create a joint work. In the case of the Boston College broadcasts, the broadcasting of copyright notices in the statutory form in favor of

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10/ Donna v. Dodd, Mead & Co., 374 F. Supp. 429 (S.D. N.Y. 1974); Maurel v. Smith, 220 F. 195, aff'd, 271 F. 211 (2d Cir. 1921); Ferrer v. Columbia Pictures Corp., 149 U.S.P.Q. 236 (N.Y. Sup. Ct. 1966).

11/ See generally, M. Nimmer, Copyright § 6.03 (1978 ed.).

Boston College Athletic Association was an express acknowledgement by the broadcaster of Boston College's copyright ownership.

As joint authors (with the respective broadcasters) of the works concerned, Boston College and the University of Kentucky -- and thus the NCAA -- are manifestly proper claimants in this proceeding. Co-owners of copyright are treated generally as tenants in common, with each owner having an independent right to license the use of the work.[12/] Clearly, the right to claim royalties for a compulsory license is co-extensive with the right to license. Moreover, the colleges are the proper parties to claim the royalties for these broadcasts, because, in view of the position taken on the broadcasters behalf in this proceeding by the National Association of Broadcasters, it appears that only the colleges have an interest in asserting claims that reflect the actual value of their sports event broadcasts. Indeed, in the case of the Boston College telecasts the college is the sole lawful claimant, because the broadcast station is estopped from asserting any claim to copyright in derogation of the institution's rights by reason of its broadcast notice acknowledging sole proprietorship in Boston College.[13/]

12/ House Comm. on the Judiciary, Copyright Law Revision, supra note 3, at 121.

13/ As the Supreme Court has declared:

> Parties must take the consequences of the postion they assume. They are estopped to deny the reality of the state of things which they have made appear to exist.

Casey v. Galli, 94 U.S. 673, 680 (1876).

V. The Compilation Claim

The NCAA anticipates that other parties will address in detail the claim of the National Association of Broadcasters that its members are entitled to copyright royalties because the "broadcast day" (or possibly some other period of broadcast operation) is in some sense a compilation for the purposes of the Copyright Revision Act. For that reason, and because it warrants no more in any event, our discussion of the NAB's claim will be brief.

Section 101 of the Act provides that:

> A "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

The statute defines a collective work, in turn, as a work such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole. 17 U.S.C. § 101.

A broadcast station's "broadcast day" (or "broadcast week", "broadcast month" or "broadcast year") does not satisfy the basic requirement of a compilation that it be in fact a single entity or work. The underlying concept of a compilation or a collective work is that of a single author assembling contributions or information from a variety of sources into one

integrated entity which is then purveyed as a unit. No broadcaster seriously expects that individual viewers will deliberately choose to watch its entire broadcast day in the same way that an individual purchases an entire anthology, encyclopedia, catalog, or periodical issue. The continuity and unity which typifies compilations thus is simply lacking from the "broadcast day". Instead, this "day" consists of a number of individual presentations bearing no necessary relationship to each other in substances or topic and typically selected by viewers for viewing on an individual basis (that is, without reference to the remainder of the concerned broadcaster's "broadcast day"). Seen in this context, the "broadcast day" is simply a period of time, and not a compilation within the meaning of the Copyright Act.

In addition, a "broadcast day" is not a copyrightable "work", because it lacks the requisite originality. While the threshhold for originality is low, it must be met nevertheless. Congress never intended that the mere sequential exhibition of separately copyrightable material be considered a single original work. Thus, the legislative history notes that a collective work does not result where relatively few separate elements are brought together, such as three one-act plays.[14/] This legislative history is strongly rooted in the case law, which exhibits numerous instances, for example, where courts have held that various business forms

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14/ House Comm. on the Judiciary, Copyright Law Revision, supra note 3, at 122.

have lacked the required originality when they were the mere piecing together of language already copyrighted or in the public domain. See, e.g., Donald v. Verco Business Forms, 478 F.2d 764 (8th Cir. 1973); Donald v. Zuck Meyer's T.V. Sales and Service, 426 F.2d 1057 (5th Cir. 1970), cert. denied, 400 U.S. 992 (1971).

Moreover, if it were possible -- as it is not -- to consider some span of time over which a broadcast station operates to constitute a compilation under the copyright law, the result would be of no consequence to these proceedings. Such a compilation would be a "collective work", because it would incorporate a number of contributions constituting separate and independent works in themselves (such as the sports event telecasts covered by the NCAA's claims). 17 U.S.C. § 101. Copyright in a collective work as a whole is distinct from copyright to each separate contribution. 17 U.S.C. § 201(c). The Act expressly provides that:

> The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and does not imply any exclusive right in the pre-existing material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material. 17 U.S.C. § 103(b). [Emphasis added.]

Thus, the exclusive rights of the owner of copyright in a collective work:

> extend to the elements of compilation and editing that went into the work as a whole, as well as the contributions that were written for hire by employees of the collective work, and those copyrighted contributions that have been transferred in writing to the owners by their authors.[15/]

Any royalty claim must be limited to the value of the compiler's contribution to the final collective work. See Hayden v. Chalfant Press, Inc., 177 F. Supp. 303 (S.D. Cal. 1959). In this instance, however, it is not the program sequence but the individual programs which are of value to viewers -- and consequently to cable television systems. The arrangement of "programs, advertisements, announcements and other broadcast matter" which the NAB claims[16/] gives rise to a copyrightable compilation is plainly and simply not worthy of recognition as a legitimate basis for a claim for copyright royalties. Accordingly, any copyright that a broadcaster may have in such an asserted compilation may be disregarded for the purpose of these distribution proceedings.

15/ House Comm. on the Judiciary, Copyright Law Revision, supra note 3, at 122.

16/ National Association of Broadcasters, NAB Suggested Broadcaster's Justification 26 (July, 1979).

VI. Conclusion

For the reasons set forth above, it is clear that the NCAA and the institutions joining in its claim are the owners of copyright in the broadcasts covered by the NCAA claims, and that they are the appropriate claimants in these proceedings. It is also clear that, contrary to the NAB's assertions, a broadcasters' "broadcast day" (or other period of time during which broadcasts are made) is not a compilation within the meaning of the Copyright Act, and even if it were deemed such a compilation, the elements of compilation are devoid of value and therefore irrelevant to these proceedings. The NCAA is unaware at this point of any further issues concerning ownership of copyright with respect to the broadcasts covered by its claims. Should such questions be raised by filings by other parties in this proceeding, the NCAA will address them at the appropriate time.

Respectfully submitted,

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Dated: November 15, 1979